CORRECTED DRAFT – This draft corrected on August 4, 2003. Corrections made to pages 15, 16, and 17.

UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

July 10, 2003

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:35 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Sheridan Downey, Pamela Karlan, and Thomas Knox were present. Commissioner Gordana Swanson was absent from the meeting, and was present for items #21 and #22.

Items #1, #2 and #3.

1. **Approval of the Minutes of the June 5, 2003, Commission Meeting.**

2. **Approval of the Minutes of the May 21, 2003, Commission Meeting.**

3. **Correction to the Minutes of the May 9, 2003, Commission Meeting.**

Commissioner Knox moved approval of the Minutes for the June 5, 2003 and May 21, 2003, Commission meetings, and correction to the Minutes for the May 9, 2003, Commission meeting. Commissioner Karlan seconded the motion. Chairman Randolph and Commissioners Downey, Karlan, and Knox voted "aye." The motion carried unanimously.

Item #4. Public Comment.

There was no public comment regarding matters not on the agenda.

Consent Calendar Items #5-12.

Commissioner Downey requested that Consent Calendar Items #13, 14, and 15 (SEI Violations) be pulled for discussion prior to approval for additional clarification by the Enforcement Division.

There was a motion to approve all other consent items on the calendar. Commissioner Knox moved and Commissioner Karlan seconded the motion. Chairman Randolph and Commissioners Downey, Karlan and Knox all voted "aye."

Item #16. Adoption of Regulation 18531.5 – Recall Elections. Staff: Senior Counsel Hyla Wagner and General Counsel Luisa Menchaca.

Senior Counsel Hyla Wagner presented a regulation which proposes to implement Proposition 34's provisions on recall elections.

Ms. Wagner: The Commission examined some of the same issues at its March meeting when it approved the fact sheet that staff revised on recall elections, and the fact sheet is currently on the FPPC web site. At the March meeting, the Commission asked staff to codify in a regulation some of the advice that was contained in the fact sheet. In connection with the attempt to recall the Governor, the FPPC was asked by the press last February about how the Proposition 34 contribution and spending limits would apply in a recall election. That is the main question that this regulation addresses. The regulation also codifies current advice about reporting requirements for candidate and committees that are in recalls at the state and local level. The regulation defines "target officer" and "replacement candidate" and then goes on to describe how the contribution and voluntary expenditure limits would apply in state recalls. As to the target of the state recall, the regulation follows directly from section 85315, which was added by Proposition 34, and it states that the contribution limits of Proposition 34 do not apply to contributions accepted by a targeted officer into a committee to oppose the recall. Similarly, the regulation provides that the expenditure limits do not apply to expenditures made by the target officer to oppose a recall. In subdivision (b)(3), the regulation talks about committees that are primarily formed to support or oppose the recall. Following past FPPC advice, the regulation states that the contribution and voluntary expenditure limits of Prop. 34 do not apply to committees that are primarily formed to support or oppose the recall and that is because the recall falls within the Act's definition of "measure," and so the general rule is followed which governs ballot measures, which is that contribution limits do not apply, based on the Supreme Court case, *Citizens Against Rent Control v. Berkeley*. In subdivision (b)(2), the regulation addresses the replacement candidates and there it says that because these individuals are candidates who are seeking elective state office, the contribution and voluntary expenditure limits of the Act do apply to them. As a general rule, Prop. 34's contribution and voluntary spending limits apply to all candidates who are seeking elective state office.

While Prop. 34 added a specific provision in section 85315 that exempts the target elective officer from the contribution and expenditure limits in the case of a recall, it didn't provide any exemption for the replacement candidates. Based on that plain reading of the definition of "candidates seeking elective office" and combining that with the general rule that the limits apply to the candidates seeking elective office, it led staff to conclude that the strongest reading of the statute, is that the contribution limits apply to the replacement candidates. A comment letter was received by Kathryn Donovan of Pillsbury, Winthrop and the letter asked the Commission to consider whether it wouldn't be fairer if the target officer, the committee supporting/opposing the recall and the replacement candidates were all on the same footing with no contribution limits applicable to any of them. Staff looked at this issue in February as to whether this interpretation would raise an equal protection issue in a recall to those who were on the same ballot and in a sense were running for the same office but subject to different limits. Under the equal protection analysis, it seemed like the replacement candidates are not

members of a suspect class, so the statute has to have a rational basis to draw a distinction between the replacement candidates and the elected state officer who is the target of a recall. Here, you have the California Constitution and the Elections Code with lots of provisions which clearly distinguish between the two, the target of the recall and the replacement candidates. The target is subject to the special recall procedures and is eligible to seek reimbursement of his expenditures if he is not recalled, whereas the replacement candidates are treated as candidates of a special election. Under these circumstances, it seems like a rational basis is present. In addition, the alternate interpretation that no limits would apply to replacement candidates in recalls is not without problems either. That might encourage candidates to seek office through the recall process, if then they don't have contribution limits, whereas in the regular election process, they do. Staff recognizes that the FPPC has had varying interpretations on the question of whether contribution limits apply to replacement candidates under the prior contribution limit schemes of Props. 73 and 208. This is seen in the *Burgess* and *Davidson* advice letters. Prop. 34 has the specific provision, § 85315, that discusses recalls, unlike the other two propositions which did not.

Kathryn Donovan (Pillsbury Winthrop): Basically, our concern is that the regulation leaves questions unanswered and we are not certain how to advise clients when they are asked to contribute to one side or the other. In a recall election, donors can give unlimited contributions to an incumbent who is the target, yet the replacement candidates are subject to limits. This seems unbalanced.

Chairman Randolph: Can staff comment on Ms. Donovan's concerns?

Ms. Menchaca: The answer to whether limits would apply and what flows from that is largely a factual question as to whether a replacement candidate is, in fact, using an issues committee as a sham committee, not setting up his or her own controlled committee to further his or her election. If a replacement candidate set up a controlled committee to clearly advocate his or her election, then the public contributors would know exactly to which committee to make their contributions. The fundamental question in the regulation is whether the Commission agrees that replacement candidates would be subject to limits, which would be different from the other two types of committees.

These are not necessarily questions that are appropriate for this particular regulation because what staff was trying to do was set out that policy issue "do limits apply?" and the basic reporting requirements. Other issues can be addressed in a separate regulation, an opinion, or advice letters.

Commissioner Knox: Does Ms. Donovan disagree with the staff's interpretation of the statutes that replacement candidates are subject to the contribution limits?

Ms. Donovan: That is the place to start, but if you end up having an incumbent who is not subject to any limits and challengers who are, then you have a fundamental unfairness that needs to be addressed.

Commissioner Karlan: I cannot tell in Footnote 1 of your letter whether the claim was as a matter of statutory construction, it was possible to say that the replacement candidates also could be free from the limits, or in essence one that the statute is unconstitutional.

Ms. Donovan: As a matter of statutory construction, it is possible to treat both groups the same. The theory would be that this is an election that involves the recall question as well as replacement candidates.

Commissioner Knox: The replacement candidates are candidates. The target official is treated as a measure and that is a product of the statute.

Ms. Donovan: Gov. Code section 82007, which defines "candidate," says that the subject of a recall election is a candidate. They too, are a hybrid.

Commissioner Knox: There is an express exemption for the target official.

Ms. Donovan: To raise funds to oppose the recall election, yes.

Commissioner Knox: There is no comparable exemption for the replacement candidate who still, therefore, remains a candidate.

Ms. Donovan: As staff advises that a candidate for elective office can form an initiative committee and use unlimited funds – no limits apply to an initiative committee even if it is controlled by a candidate but they can't use it to further their candidacy, whatever that means.

Commissioner Knox: Is the point of the questions you have asked that it opens things up to subterfuge?

Ms. Wagner: That is an issue the Commission has looked at several times and most recently, under 208, staff wrote an advice letter saying that the candidate and any committees they controlled were subject to the contribution limits. Based on *Citizens Against Rent Control v. Berkeley*, the Commission advised that, no, you can't prohibit a candidate from controlling a ballot measure committee. That is from the *Kopp* advice letter. Though that letter wasn't in the recall context, it did involve candidates who were sometimes running ballot measures to boost their candidacies.

Commissioner Karlan: You can see why question 3 from the letter then becomes very difficult. Because suppose you have someone who is the replacement candidate who forms a committee and the committee is called …. Let's say, I'm the replacement candidate. It is called the Pam Karlan Committee to Recall Mayor Jones or Assemblyman Smith. Well, is that committee entitled to receive unlimited contributions from the public and make unlimited expenditures because it's … or the fact that I am also a candidate turn the creation of that committee into express advocacy for the candidacy, in which case, it is subject to the same limits?

Ms. Menchaca: We thought about this and the recall committee itself would have to include the name of the recalled candidate and whether the committee was in support or opposition to the recall of that candidate. So, I think if a committee had the name of the replacement candidate, we would say no, it doesn't fit under this. It's a controlled committee for the purposes of supporting the replacement candidate.

Commissioner Karlan: Even though it says the "replacement candidate committee to replace the target official"? So the use in the name of the committee of a replacement candidate's name transforms it from an exempt committee into a replacement candidate committee subject to the limitations on candidates?

Ms. Menchaca: Right. Despite the name, it certainly can become that type of replacement candidate controlled committee. I would suggest if these committees are going to be formed and we do get advice letters from candidates stating this is my level of activity, intended activity in this issues committee. I will not be involved in controlling the funds, this is what I am going to engage in. And then what we do is we do an analysis under Gov. Code § 82016 whether in fact it is a controlled committee for the purpose of supporting his or her own candidacy. It is construction of that particular statute. We can do that. But again, it would have to be based on what the candidates tell us. They are going to do what the committee tells us it is going to do and then we answer that question. The advice is out there, we have guidance from the Commission on the issue, but it is fact dependent.

Commissioner Downey: Ms. Menchaca, this hypothetical that Commissioner Karlan threw up, I was thinking of myself. We've got a replacement candidate who forms a committee calling it a primarily formed ballot measure type committee to recall the target officer, but puts the name of the replacement candidate in there. And this committee is going to do the obvious. It is going to do two things; it is going to be a true hybrid. This is what is causing us problems here. It is going to put out information attacking the target officer and supporting the recall effort, initially the qualification of the recall and subsequently, once qualification occurs, of course the recall itself. And then the second thing it is going to do is tell the voters why Jane Doe, Pam Karlan is the best replacement candidate through candidacy effort, typically subject to limits. So we've got a committee doing what seems to me a fairly predictable and probably fairly reasonable thing in the context of a recall election, attacking the target candidate, supporting the recall and supporting the candidacy of a particular replacement. Do limits apply, is the question I have.

Ms. Wagner: You've got it as a candidate controlled committee.

Commissioner Downey: Do I?

Ms. Wagner: Yes, if the candidate is setting it up then the candidate is controlling it even if it's a ballot measure committee, it is a candidate controlled ballot measure committee.

Commissioner Downey: So limits apply?

Ms. Wagner: Yes, if the candidate is telling voters about supporting Jane Doe.

Commissioner Downey: Among other things.

Commissioner Karlan: So in other words, the negative campaign is not subject to any limits by the replacement candidate. In other words, the replacement candidate can set up two committees: one called Get Rid of Assemblyman Jones Committee and another saying Put Me in Assemblyman Jones's ….

Ms. Menchaca: Correct.

Commissioner Karlan: With regard to the first committee, no limits apply. With regard to the second committee, the limits apply. The question is how contributors should allocate their contributions. Right? Their unlimited contributions should go to the first committee and limited to the second.

Ms. Wagner: I would think the third question is asking can the replacement set up a separate pro recall campaign and control it while they are still running?

Commissioner Karlan: Even if the candidate control issue can be surmounted, the supporters let's say can ….

Ms. Wagner: Oh yes, the supporters can ….

Commissioner Karlan: … set up a committee called, "The Committee to Get Rid of So and So Because There Are Better People Out There," like for example … Mr. Replacement Candidate. Is that a committee that can accept unlimited contributions? Or not?

Ms. Menchaca: I think once you start adding that factor, saying there is a better candidate like … and that candidate also happens to be controlling that committee.

Commissioner Karlan: But what if the candidate isn't? Can supporters of that candidate make unlimited contributions to that committee because it is not a candidate-controlled committee?

Ms. Wagner: Well, the $5,000 limits on committees come in under 85303. (Reads statute)

Commissioner Karlan: So we would define that as a contribution to a candidate for elected state office and then read the limits back in?

Ms. Wagner: Yes, it depends what the committee is doing. If they are supporting the candidate, it could become subject to the limits, but ….

Ms. Donovan: Couldn't it be an independent expenditure if they are not acting jointly with the candidate?

Ms. Menchaca: Right.

Commissioner Karlan: See? That's why I take it that is what your client's confusion is. Can they set up a committee called "Get Rid of X Because Y Would Be So Much Better" and thereby make unlimited contributions consistent with the law?

Ms. Donovan: There is confusion about can we make unlimited contributions to that type of committee, can we make unlimited contributions to a controlled committee of a replacement candidate and can we make unlimited contributions to the target, a committee set up by the target candidate when the target candidate is using that money to attack replacement candidates or perhaps, to support them. I know I am going to lose, but Candidate A is your best choice.

Chairman Randolph: It seems that all those questions are to some degree, fact dependent. It depends on what the committee is doing and what kind of expenditures they are making to some degree. I am not sure that is a question we would be able to answer in the general regulation.

Ms. Menchaca: If I may add one other consideration. With respect to replacement candidates and the policy issue of providing contribution limits thereto, one of my concerns as well, as we are working with the whole Prop. 34 scheme as you know, we have the carry over provisions and the Commission has drafted regulations that deal with how to deal with transfer situations and so forth. You might have a replacement candidate raise funds in unlimited amounts knowing very well that he or she is not really running a serious campaign for this recall, and then be able to carry those over unrestricted for the next time the candidate plans to run for the elective office. It is a narrower, more cautious approach but it is appropriate in light of other Prop. 34 provisions that can result in some unintended loopholes.

Chairman Randolph: It seems to me that we are talking about the general policy question and the implementation of that policy. It seems to me that in terms of the general policy as a matter of statutory construction, the Commission's conclusion in March was correct. Staff's recommendation is correct that the limits apply to replacement candidates. Just because the implementation of that is going to be somewhat difficult, doesn't mean that the initial conclusion is incorrect.

Stephen Kaufman (Smith & Kaufman): I am here on behalf of the Governor Gray Davis Committee and Governor Gray Davis, who has an interest in this matter. Section 85315 clearly does not place any limits on a recall target's ability to communicate with voters and doesn't place any limit on the amount a recall target can receive into such a committee. This is distinguished from prior efforts, Prop. 208 and Prop. 73, which didn't make that distinction. Here we have a statutory provision which makes that distinction. To sit here and start trying to place limitations on a target official's ability to

communicate with voters in whatever way the target official sees as a way to defeat a recall effort, seems to raise a host of constitutional issues and presents a slippery slope for this Commission. There may, in fact, be factual scenarios such as those put on the table this morning that create issues with respect to activities of various committees who are involved in the recall process, but it seems that those are matters which arise under other provisions of the Political Reform Act, other regulations dealing with controlled committees, independent expenditures, and contribution limits and should not be the subject matter of this particular regulation that is before this Commission today with respect to Gov. Code § 85315.

Commissioner Karlan: Two questions: In part (c)(1) it says "target officers." A target officer can either use a committee for the office held to oppose a recall for a target officer or can establish a separate committee to oppose a recall. What is your understanding as to what happens to a target candidate who accepts into his general office committee unlimited contributions? I take it those would still be limited, assuming a candidate succeeds in avoiding the recall in any future campaign, the candidate is unable to spend that money if it goes over the contribution limits, is that correct?

Mr. Kaufman: Well, in the particular case before us, because of the nuances in the law and the fact that the Governor Gray Davis Committee, which is still an active committee, is not subject to any contribution limits as a committee that existed prior to Prop. 34, in this particular instance, the target official could raise money into either committee in unlimited amounts. Under the Act, we would be permitted to spend funds for political purposes out of either committee - that wouldn't be an issue.

Ms. Wagner: You are correct, but you couldn't bring those funds into a future … the funds would have to be brought in subject to contribution limits if he were to run for another state office.

Chairman Randolph: As time goes on, and the pre-Prop. 34 committees start disappearing ….

Mr. Kaufman: That will no longer be an issue.

Ms. Wagner: All future candidates would have more of an incentive to set up a separate committee because the only way they could raise funds not subject to the limit for recall would be in the separate committee. Here, the only difference it makes is that there are stricter provisions on the recall committee about disposing of the funds within 30 days or 60 days after the recall. You have to get rid of any leftover money. Whereas, that wouldn't apply if you had just raised it into your general committee.

Commissioner Karlan: Going back to Ms. Menchaca's context question, even a target who raises unlimited funds is limited in receiving those funds or in spending them if the target engages in something that looks like an attempt to support or oppose a particular replacement candidate, or is that not true?

Mr. Kaufman: Again, it would be a factual determination. If a target is trying to defeat a recall, where do you draw the line in terms of how much that target official can attack the people who are trying to throw them out of office and making the determination that he is spending money to oppose somebody as opposed to trying to hold on to his or her position? If we could all agree that certain activity crossed the line, perhaps there could be implications under other provisions of the PRA as to whether that might be a contribution to a candidate.

Commissioner Knox: Is there a line there, Mr. Kaufman? Can the target official who receives money to oppose the recall spend it any way he or she wants to, including taking shots at replacement candidates?

Mr. Kaufman: I don't think § 85315 places any limitation on the target official's ability to communicate with the voters to oppose the recall. I would suggest to you that in these circumstances, attacking people who are trying to replace you is part and parcel in trying to defeat the recall.

Commissioner Knox: Is that consistent with ... do you have a view on that?

Ms. Wagner: Until Ms. Donovan had raised that point, that the statute allows them to open a committee and make expenditures to oppose the recall, several ways to oppose the recall. You oppose it in principle, you talk about your own accomplishments or you attack your opponents. I hadn't thought of that as limiting language, expenditures to oppose. I suppose if you started making contributions, which is possible to support one of the replacement candidates, that would raise more questions possibly. I hadn't thought of opposing the recall as really very limiting language on the expenditure.

Chairman Randolph: If I could add a point. The converse is also true. There are committees that exist to support the recall that have the ability to use unlimited funds to attack the target officer. So the system is basically set up for a negative campaign.

Mr. Kaufman: The entire premise of those who support the recall is to attack the person who is in office. Section 85315 recognizes that and provides the target, after all they are called "the target," with the ability to fight back.

Commissioner Downey: You are probably on fairly safe ground on this point. The first question Ms. Donovan really asked was, what if the target candidate starts attacking the replacement candidates? Shouldn't that perhaps in fairness bring in contribution limits and that raised the question Commissioner Knox and the Chair and Commissioner Karlan have all raised. Where do we draw the line? Do we really have a line? It seems to me impossible. Common sense says to attack the proponents who may well be replacement candidates, and so the statute 85315 is just going to do away with the contribution limits in allowing the target officer to attack the individuals who are behind the recall effort, as well as the recall effort itself on perhaps philosophical grounds, as such. What if the recall target starts supporting the replacement candidate? That one I am not ready to give an opinion on and I don't think we have to right now. The way we have drawn the

regulation is satisfactory. There are always going to be questions raised, particularly regarding the activities of the replacement candidates, but we have a fairly good regulation in place.

Chairman Randolph: Any other comments from the public?

Ms. Donovan: I just want to point out it strikes me as inconsistent that if we can make a distinction between funds raised by a controlled replacement candidate's committee to support the recall, but not to campaign for that candidate's own office, and can't make a distinction between the target officer's efforts to stay in office versus oppose others. That's the problem that has been raised to me.

Commissioner Knox: A good question. What happens if a replacement candidate creates a committee to support recall? Is that committee which supports recall which is nevertheless controlled by the replacement candidate, is that going to be subject to campaign contribution limits or not?

Ms. Menchaca: I don't think so.

Commissioner Knox: Suppose the replacement of that committee now says you should recall the target official, because the target official is dishonest while the replacement candidate is honest. The target is unsound on this and the replacement on this is sound, so now you have a hybrid at work which nevertheless I think could reasonably be called a support for the recall effort. What do we do about that?

Ms. Menchaca: You talk about a communication that would say the target candidate is dishonest. That itself is a committee to support the recall. At the point that you started saying, "therefore, you should support the other candidate." That is when it would potentially be a committee of that candidate, if the replacement candidate is, in fact, controlling the decisions of that committee.

Commissioner Knox: So what the Chair says is correct? We are really set up for a negative campaign? No campaign limits, no limits on the negative campaigning?

Commissioner Downey: And that the situation is fact-driven. Three of the commissioners have thrown out basically the same hypothetical to you where you have a committee doing two things. It's a hybrid. To draw a regulation puts in a line, a bright line that will help Ms. Donovan and others answer their clients' questions, seems like a task we are not up to.

Chairman Randolph: It ends up being very fact dependent.

Commissioner Karlan: That is because the way the statute is now. It is incoherent given the realities of what happens in a recall situation. In the old days when the recall was on the ballot and then there was later a replacement election, this distinction could easily be drawn in and be totally coherent, but there isn't a way to come up with a coherent

distinction, and then the question is, in terms of enforcement, does it go to the purpose of the behavior, or does it go to some objective test of when something has become a sham? I don't have a way of judging that.

Colleen McAndrews (Bell, McAndrews, Hiltachk & Davidian): You keep coming back to everything being fact based. I see the Commission on a slippery slope. I don't disagree with Mr. Kaufman's analysis that you have done the right thing in terms of granting unlimited campaign contributions to the target under the statute. I think that is probably very clear. Let's keep in mind, it isn't what a committee is, or what they are called, it is really what they do. It is the communication. It is the speech that is made to the voters trying to influence an election. So if the target candidate has a communication in which he or she says, "don't support the recall, I'm okay and all of these other candidates who are seeking my office are scumbags," you are probably in a safe position under the First Amendment to say that that can be done with unlimited funds. Where your slippery slope comes in, is where you have tried to parse the statute and based on precedent, some old advice letters, say the replacement candidates have to be under Prop. 34. That is where you are on the slippery slope. You are setting yourselves up to be the Politburo of political speech in the upcoming recall election this fall. You're going to have to look at every piece of communication that is proposed by a replacement candidate, a non-controlled committee that's supporting replacement candidates, a non-controlled committee that is supporting or opposing the recall and whether they mention other candidates and the way they mention them. Fundamental free speech issues that this Commission is taking on in terms of advising Ms. Donovan's clients, our firm's clients, as to what can be said in the recall. So if there is any way you can get away from your policy established last spring, which made sense, it followed precedent, it seemed okay when everything was in the abstract. But now it is coming close. You know who the candidates are, and you know the issues, you know what the speech is going to be. You are setting yourself up to be the arbiters of who can say what under limited funds and unlimited funds, and I urge caution.

Commissioner Karlan: How do you read § 85315(a)? (Reads statute.) I don't see how it is possible to read the express exemption of the target candidate as anything other than the continuing inclusion of everybody but the target candidate. Just as a matter of statutory construction? You may be right that the statute is unconstitutional as a result of its drawing that line, but as a matter of statutory construction, I don't see….

Ms. McAndrews: There is the inconsistency prior to Prop. 34, where a candidate is defined as a candidate subject to a target. You are sort of ignoring that and saying that this later statutory provision takes precedence, so I think there is ambiguity and confusion here. I think the Commission has the regulatory authority to do fairness, to do due process and protect free speech rights in the political arena. It is such a sensitive arena.

Fred Lowell (political law department of Pillsbury, Winthrop): I work with Ms. Donovan. I'd like to point out that the rules that you are going to or may enact today notwithstanding Mr. Kaufman's obvious concern, are going to apply to all recall elections, not just this one. California is trendy and no doubt there will be other

elections. These rules are going to come up again. I read in section (a) that the target can raise unlimited funds to oppose the recall. I don't read that provision to provide that the target may use unlimited funds to meddle into the second part of the election which is the race for the replacement. I think taking Ms. McAndrews's comment as an example, the target says to vote against the recall because Replacement A is a jerk, to say that is subject to unlimited funds, and that Replacement A can't come back and say, vote for the recall because I am not a jerk, seems to me a lack of parallelism and a problem of fairness. I also think that if that ends up being the interpretation, either by regulation or by advice letter, that it is susceptible to attack by someone down the road. If the Commission's opinion is, in fact, that one side basically has the ability to raise unlimited funds, that is the target, because everything that person does is going to be deemed to be against the recall, no matter what that person says, but that when you take the replacement candidates, everything they say is going to be for the recall, because after all, that is the only way they are going to get into office, then what you have said is one side has no limits, and the other does. I don't think that is going to fly in the end, and I know it is late in the game, you have worked hard on the regulation, but it might be worth going back to see rather than relying on the advice letter process to see if the regulation could deal with some of these issues that have been raised.

Chairman Randolph: Doesn't your concern raise the same issue as Ms. McAndrews raised?

Mr. Lowell: I think so. I can imagine that you will get lots of advice letters depending on how the regulation comes out asking, we are about to do XY&Z. Which activities are subject to limits and which aren't, and then you are going to be splitting hairs on things that you probably don't want to split hairs about. It takes time for the advice letter process to work as it has to. I agree with Ms. McAndrews and Ms. Donovan. It is a slippery slope. I don't think you are as trapped by the statute as perhaps you think you are. I don't think that (a) says that a target can raise unlimited funds other than to oppose the recall. What does the recall mean? If it is that I can say anything I want, because everything I say is going to oppose the recall, that is over broad.

Scott Hallabrin (Assembly Ethics Committee): In 1990, the Commission adopted a regulation, when Prop. 73 and its contribution limits were in effect. We adopted a regulation after a horrific fight and Commission beating that got into the issue of when a ballot measure committee is making a contribution to a candidate and extended even into the issue when Candidate A might be making a contribution to Candidate B by running an advertisement where Candidate B is endorsing Candidate A, but also might be getting some election benefit from that advertisement. We were sued and it went before Judge Karlton in federal court. It was the *Wax* case. The court issued an injunction in that case and it might control some of these issues. If I recall, it said there is no contribution from the ballot measure committee or Candidate A to the other candidate unless there is express advocacy in the communication. I believe the court specifically said it wouldn't get into the issue when a candidate's own ballot measure committee runs advertisements about that candidate, or includes that candidate. So Candidate A forms a ballot measure committee and then includes himself or herself in the advertisement advocating the ballot

measure. It may control what the Commission might be able to do on this. It was an injunction against the Commission.

Steve Lucas (Nielsen, Merksamer): Just wanted to point out two things that are important to contributor-type clients, much as Ms. Donovan has her initial concern. I believe first of all, that the FPPC advice letter process will not work for this issue. The time frame for a recall election is most likely a 60 to 80-day period from the certification date to the election date and is not going to allow for the usual one month, 20 working day turnaround of advice letters. Second point: if you believe that is accurate, and advice must get out to political community when election heats up, I think there are two fundamental questions which need to be answered in regulation. To put them down precisely: Whether replacement candidates can form a second committee taking in unlimited funds to support the recall: to expressly advocate the recall of the target official, putting aside that they would have a second committee which is taking in limited funds to expressly advocate their replacement election. The second question is the corollary of that: Can the target official use his or her unlimited funds or must he or she set up a second committee to take in limited funds to use for communications which expressly advocate the election or defeat of a replacement candidate as opposed to their own retention of their office? Very core questions, not hypotheticals. These are going to come up. These are what people have to start planning their campaigns around. Planning on how to raise funds, one committee or two, what are the limits that apply, what are their communications going to say and which committee do those communications come out of? Within the context of those two questions, which should be answered today or in August, the statute does allow you the latitude you need to come up with the right answer and not an unconstitutional answer. I understand on the earlier question of whether the replacement candidate is subject to limits with respect to express advocacy of his or her own election, and the question is the target candidate is not subject to limits with respect to opposing the recall, I think the statute does tie your hands on those two questions, and they can be answered in the regulation. These other two questions are not answered in the draft regulation. Those two questions have to be answered in a way that is going to be both justified fairly by the statutory language and won't be subject to serious challenging in court.

Commissioner Downey: Staff, do we see any problem with a replacement candidate forming two committees, to support the qualification and then the recall, and then to support the replacement candidacy? If a replacement candidate does that and follows what he or she says he is going to be doing within the two committees, I don't see a problem.

Ms. Wagner: It would be consistent with *Kopp*. You would get the problem of keeping activities separate.

Commissioner Downey: Sure.

Ms. Wagner: That is right. That would be consistent with *Kopp.*

Commissioner Downey: The second question is, are we going to flip that for the target? And make him or her do the same thing with two committees. The way we have drawn the regulation now, I wasn't ready to put a bright line between attacking people who may turn out to be replacement candidates and attacking the recall effort as such. That one, I have trouble with.

Chairman Randolph: Agreed. The answer to the first question is that we have no reason to depart from existing Commission advice that you can have a candidate-controlled ballot measure committee. The only question would be the factual question of, is it really about the ballot measure committee or are they just doing a bunch of express advocacy in support of the replacement candidacy? On the second issue, I don't read anything in the statute that would draw the line between the communication to oppose the recall and whether or not that communication mentions a replacement candidate.

Commissioner Karlan: I think it is more difficult than that. In the sense, there is a gray area, but there is area where if you had a target official who wants to publish, "I'm going down in flames, but whatever you do, don't elect Candidate X as the replacement candidate," I don't see how that can be subject to unlimited expenditure by the target and have it consistent with the overall law.

Ms. Wagner: Because he is not opposing the recall there.

Chairman Randolph: So the line you would draw is that it opposes the replacement candidate but does not oppose the recall?

Commissioner Karlan: That's right. If the communication doesn't oppose the recall, but simply says, "Look, you can keep me or you can toss me out, but whatever happens, don't elect him," I don't see how the target candidate can, consistent with the overall limits, do that - an unlimited expenditure that simply goes after a replacement candidate without any attempt to defeat the recall.

Commissioner Knox: As long as it is a hybrid ….

Commissioner Karlan: Yeah.

Commissioner Knox: No matter of the relative proportions, it would be exempt from the contribution limits.

Commissioner Karlan: I am not sure whether you mean regardless of the proportions. That is, an ad that says at the very bottom of the page, "Keep me in office" and then the whole ad says "terrible." I understand what a mess this makes of things, but I don't see how the fact that you merely give a whiff of oppose the recall somewhere in the ether, turns what is otherwise an express advocacy….

Commissioner Knox: Yet if you are going to draw the line, it really is problematic. Not only in the fairness of a later adjudication, but in telling lawyers and contributors and candidates what they can and can't do in advance, which really is our job.

Chairman Randolph: But the statute already draws the line that Commissioner Karlan just described. That statute says that expenditures of the target candidate to oppose the recall are subject to § 85315. So if you have an expenditure that does not oppose the recall, which is what you just described, then it doesn't fit under § 85315. If you have an expenditure that does oppose the recall, and also attacks the replacement candidate, then it seems that it fits under § 85315. It seems the statute has already drawn the line for us.

~~Mr. Kaufman~~ Steve Lucas: I would say the regulation must be clear on that point. I don't disagree, if the language expressly opposes the recall, that answers the question and I don't think the Commission in a regulatory process has to get factual at all. I don't think that is what is asked here. The flip side to it has to also be clear, which is that express advocacy in support of recalling this public official, even by a replacement candidate, is not subject to contribution limits. Otherwise you have created a system that is not statutorily mandated but does have all the problems of fairness and equal protection that all of a sudden because this person happens to have the status of a replacement candidate, he or she cannot use the unlimited funds that everyone else in the state can. To advocate Question No. 1, should the target be recalled? Fundamentally, what we have here is two elections on the same day, the second election possibly being irrelevant depending on the first. I don't think it is that difficult to come up with a regulation that doesn't have any hypothetical facts in it, but simply uses the language of the first question versus the second question, express advocacy relating to the first question, express advocacy relating to the second question, meaning the replacement candidates. The language won't answer every question, such as Commissioner Karlan's, but those don't need to be answered here today. We need answers as to what the donor community is subject to when they are giving contributions.

Commissioner Karlan: Only ads that at least contain express advocacy on Question 1 can be exempt. That is, if there is no word, "support the recall or oppose the recall" in the ad, but it talks about candidates, then is it subject to the limits?

~~Mr. Kaufman~~ Mr. Lucas: I don't think in a regulatory context you have to parse it like that. Instead, following sort of how regulations have been drafted in the past, the language is something like, "expenditures expressly supporting or opposing the recall of a target official are not subject to limits."

Commissioner Karlan: And everything else is regardless of whether it is funded by the target of the recall or funded by a replacement?

~~Mr. Kaufman~~ Mr. Lucas: And then you have a factual question for a later date that is not typically subject to regulatory process but interpretations of how the regulation applies, which is "Is that a sham ad?" "Is that really in opposition to the recall?" or is this a sham supporting candidates? That determination can be made on a factual basis, and I think we

in the political community that have to give advice can give reasonable advice if we have the rule that expenditures expressly advocating support or opposition of a target of a recall are not subject to limits. And then the flip side to that rule for replacement candidates.
Commissioner Knox: Mr. Kaufman's view that an ad by a target official which slams a replacement candidate is however, an ad opposing a recall.

~~Mr. Kaufman~~ Mr. Lucas: And I think it can be.

Chairman Randolph: Even if it never mentions the recall?

~~Mr. Kaufman~~ Mr. Lucas: I don't think you are going to come up with a regulation that answers that question that also disallows the sham ad that you were worried about. Where the public official is clearly losing, says he is losing, and replace me with someone that I like and here is the person. I don't think that has to be answered in the regulatory context. If the ad is fairly interpreted as opposing the recall, then it fits under that rule and if it cannot fairly be characterized as opposing the recall, because it is a sham and it simply says oppose the recall very small but that is not the intent of the ad, then it doesn't fit under the rule.

Chairman Randolph: It seems to me if the ad says it is opposing the recall, even if it is small print, I don't know if I would go on to say it is a sham ad. If it says "oppose the recall", it says "oppose the recall."

~~Mr. Kaufman~~ Mr. Lucas: I don't expect these facts to happen, there could be circumstances … we could do the flip slip, which is the replacement candidate coming up with an ad that touts his or her candidacy 59 seconds of the 60-second ad, and then says, by the way, "recall the target." I think in fairness that is probably an advocacy of a replacement candidacy and not advocacy of recalling a public official.

Chairman Randolph: Basically, § 85315 says we are not going to treat the target officer as a candidate. We are treating this as a ballot measure, the target officer is the person who is subject to the recall, they are not on the ballot as a candidate that somebody can choose to vote for. To the extent that they are treated differently, it is not clear, this is the incumbent and this is the challenger. I think recalls are different.

~~Mr. Kaufman~~ Mr. Lucas: They are, but we are not saying in the statute that for all purposes we are treating the recall target differently. We are saying that for purposes of opposing the recall. So if that recalled target candidate starts running ads with unlimited funds that say, "looks like I'm losing this office but I really want to run for Congress," we are not going to say that the federal election limits don't apply. Again, it has to be for expenditures opposing the recall. I think there is broad latitude.

Chairman Randolph: The target officer is bringing in an entirely different election into it. We're talking about a target officer that is spending money to oppose the recall and attack replacement candidates as part of their strategy of opposing the recall.

~~Mr. Kaufman~~ Mr. Lucas: My point is, that I believe the statute still requires that the expenditure by the target official to be under the unlimited terrain in Prop. 34, it has to be an expenditure to oppose the recall.
Ms. Wagner: The regulation assumes they would be as the starting point. That they wouldn't just roll over.

~~Mr. Kaufman~~ Mr. Lucas: I agree. This is the small part of the problem. The corollary of the replacement candidate who would need to run … this isn't a small likelihood. It is a large likelihood that replacement candidates need to win both questions to be elected to office. There is going to be a huge need on the part of people supporting the recall of the public official to win on two questions and so therefore, there is a real need to answer the issue: Is effecting the vote on the first question subject to limits or not? If the person who is doing the communication happens to be a replacement candidate, who is subject to limits - Question No. 2.

Mr. Lowell: What we are really talking about is communications as Mr. Kaufman alluded to is communications and you could define in your regulations that recall communications are what they are - communications for and against the recall. You can also have a definition which unambiguously and expressly advocates the defeat or election of any specifically identified candidate is subject to limits. I think that would solve most of the problems.

Chairman Randolph: I don't think that I would go so far as to say that. I want to stop at this point and decide what we are going to do. It seems to me that we are okay with the way the regulation is currently drafted. Do we want to do more? One option: Noticed for adoption today – we could go ahead and adopt this today. Option A is we adopt today and we are done. Option B is we adopt today and come back in August and come back with an emergency reg. I am assuming given the timing we would probably qualify, and look at the possibility of answering one or both of the questions raised. As I see it, I don't personally see any need to draw any lines interpreting § 85315 – it is what it is. You can oppose the qualification of recall measure and the recall election itself. I don't see where there is room to say we are going to parse out those communications and if your strategy for opposing the recall involves attacking replacement candidates, we are then going to say that is subject to the limits. The preference would be just to deal with making it clear that a replacement candidate can indeed form a committee to support the recall and can indeed make expenditures to support the recall that are not subject to the limits, because we have said that a person can form a committee to support the recall and those contributions would not be subject to the limits. Consistent with existing advice, consistent with the statute and if we have factual situations involving a sham recall committee, we can deal with that, not departing from current advice that a candidate can control a ballot measure committee and it doesn't necessarily turn it into a candidate's committee subject to the limits.

Commissioner Karlan: Given § 85315 and the statement of exemption of the target official spending money to oppose the recall, why doesn't it make sense to say in his

communications that he has got to explicitly oppose the recall so that you can't have something that is simply spending? Well, you could infer from the fact that I have said all these terrible things about somebody who is running that you should vote against the recall. What is the problem with requiring an expressed statement that opposes the recall in the communication to have it fall within the exemption of 85313? Why not?

Commissioner Downey: We can argue we've got it in there. We adopted the statutory language in the regulation. The contribution limits don't apply where the committee created by the target officer is established to oppose the qualification of the recall measure.

Commissioner Karlan: Even if they make a communication that itself does not say oppose the recall measure? As long as the purpose of the committee as a whole is to oppose the recall, they can do whatever they want?

Chairman Randolph: It is hard for me to envision. Explain what activity the target officer would be doing that would not be opposing the recall but would be attacking the replacement candidate?

Mr. Kaufman: I think very little and I don't think the issue is what the purpose of the committee is. It is the purpose of the communication.

Commissioner Karlan: Exactly. If you have a communication that does not say to the audience, "oppose the recall," why should that be something the candidate should be able to spend unlimited funds on?

Mr. Kaufman: I don't think we've ever required that a candidate has to explicitly say "Vote for me" in a piece if they don't want to say it. Similarly, I don't think there is anything requiring that it say "oppose" if it could be fairly well understood.

Commissioner Karlan: There is one exemption in the contribution and expenditure limits which is for targets in opposing a recall. Otherwise, you can see the target official would be limited if it were an election where the target official wasn't running. Generally, the target official like any other committee would have to abide by contribution and expenditure limits. No or yes?

Mr. Kaufman: Yes, but the parallel here is we are talking in the hypothetical. The target of the recall is somehow going to give up and one, not want to direct his resources against the recall. For example, I would concede that if the target official does a piece that purely supports another recall candidate and all it does is say, "Vote for So and So," that might implicate other provisions of the Act as to how that gets reported. I don't think that changes the nature of the committee or what that committee can receive. There are limitations in other parts of the Act. It is conceded that the replacement candidates get two bites of the apple - they can create two committees. If one of those committees starts to engage in conduct that is candidate-related, then that committee is going to be subject

to other provisions of the Act. I don't think we need to expand the scope of the regulation before you.

Ms. Menchaca: I agree and as an example, the question of voluntary expenditures, the Prop. 34 scheme as far as the type of expenditures subject to the ceiling, refer to specified subsections in the contribution definition referring to election-related activities. Those subsections are pretty much express advocacy type of communications. Already built in.

Ms. McAndrews: You assume that the candidates have to be under contribution limits. I pose a theory that they do not. Section 85315 is not the sole determinant here as to the recall being unlimited. Speech for and against the recall is unlimited under the Constitution which sets the initiative, referendum and recall as ballot measures. Ballot measures have unlimited contributions under the *Berkeley* case. Section 85315 talks about opposing the recall, but are we granting the supporters of the recall unlimited contributions for their speech supporting the recall? Could it be implied that a candidate that is running as a replacement candidate is implicitly in favor of the recall? It is an exercise in futility if the recall does not go forward. They are supporting the recall by even presenting themselves as a candidate saying this person should be recalled and I am a good person to replace the target. Drafters of § 85315 didn't want to rely on the *Berkeley* case and the FPPC prior advice so they explicitly put the section in to give protection to the recalled candidate. When it started in the 1980's, it was two separate elections. Confluence of a lot of different laws coming together right now in 2003 are creating a conundrum for you. Having to parse communications and decide if they are 60, 80, 90 percent opposing a recall and how much is supporting/opposing a candidate whether they are linked or not. I envision a person citing case law and the Constitution and saying that their speech is designed to support the recall and can be done with unlimited contributions.

Commissioner Downey: Combine two elections here: First, the recall, characterized as a ballot measure, the second a battle to get elected. Now that we have suddenly pushed the two elections together, we are going to have to give unlimited campaign contributions that we still ought to hang onto what we had historically. The notion of a separate election for the office among competing candidates is now under our policies subject to contribution limits. Most recall elections occur in small communities. The target candidate is likely to be attacking a special interest in the jurisdiction which is not always going to be a replacement candidate. Should we try to separate the efforts of the target officer to oppose the recall and to attack the replacement candidate if the primary moving force behind the recall effort happens to be a special interest who is not a replacement candidate? Nobody is going to have a problem with the target officer saying, "Look what is really going on here, this is why they are trying to get me out" and "oppose the recall." But if that special interest jumps in and says he is also a replacement candidate, I don't see why we have to say to the target officer, now he has jumped into the hoop, now of course you have to form a separate committee and make yourself subject to contribution limits.

Ms. McAndrews: You are correct in saying you don't have to give up the contribution limits because you have the language in the statute, but I think you should and I think you can.

Chairman Randolph: A good example of what you mean to oppose a recall? It might mean attacking a replacement candidate individual, but it sometimes means attacking something completely different. I'm not sure at what point we say that because you are attacking something, you are no longer actually opposing the recall.

Ms. Donovan: I have a copy of a new case that deals with the recall in San Diego. Surprisingly, the federal district court decided that the recall effort was not a ballot measure. It was a candidate election and limits would apply. Ms. Menchaca has a copy.

Ms. Wagner: There is that whole local scheme which categorizes a recall as a candidate election and applies the limits to everybody.

Ms. Donovan: Including the target officer.

Ms. Wagner: The target officer, the committee supporting or opposing the recall and their $250 per donor limit. In fact, in our regulation, there is language.

Commissioner Downey: There is no state officer I assume in the San Diego case.

Ms. Wagner: A local election. It seems that they could be logically categorized as either a candidate election or a measure; it is just that our state statute categorizes them as a measure.

Mr. Woodlock: If I could break in. I am probably the only person who has had a chance to read this and it doesn't involve the PRA, it involves the local ordinance. It discusses the constitutional standard of review for an ordinance that imposes a contribution limit. The argument there was again a constitutional argument, where you have strict scrutiny if you have a ballot measure which is issue advocacy and a contribution to an issue advocacy committee versus a more relaxed form of scrutiny, if it is like a candidate election and you are simply dealing with contribution limits. The court dealt with that constitutional question. The court wasn't analyzing our statute. Interesting discussion, relevant to our points discussed today. It does bear reading. The court also found that even in San Diego, you have a hybrid kind of procedure. It is partly like a ballot measure when you are circulating a petition, and partly a candidate election. The court is reasoning on a motion for preliminary injunction, so it is quick and dirty reasoning, but the court found that you couldn't separate this process into more than one process. You couldn't treat it as a ballot measure at one stage and a candidate election at another. In other words, you couldn't draw the line, as discussed here. This judge weighs in supporting the proposition that you really can't do it. This is a district court judge in a different case on a motion for preliminary injunction. Only interesting, not controlling.

Chairman Randolph: Let's go ….

Commissioner Knox: May I make a suggestion? I am comfortable with the regulation the way it is. I would propose to adopt the regulation in its present form. I do think the questions that have surfaced today, in fairness perhaps by way of, and before the recall election, if in fact it gets rolling. I would propose to adopt the regulation and do an emergency regulation that addresses the questions raised today.

Ms. Menchaca: A separate regulation? Or a modification? The timing, whether the staff worked on an advice letter on an expedited basis or fact sheets, or whatever you wanted, we'd obviously make every effort to do that. It should be in August. I agree.

Chairman Randolph: I don't think it should be an advice letter. I think people are asking for Commission direction. I think we do either a fact sheet or an emergency regulation. I'd be comfortable doing a fact sheet. We are talking a specific issue and we'll put it in a regulation later on, as we did with the limits themselves.

Commissioner Downey: We can adopt the regulation and come back with a fact sheet that has some of these hypothetical situations we've thrown out today, such as the target candidate spending money to attack replacement candidates, to support replacement candidates, and then replacement candidates doing the hybrid thing, supporting the recall and suggesting they are the best alternative.

Ms. Menchaca: I would just ask if there are additional questions that haven't come up today, that are important, that the members of the public try to give it to us as soon as possible. Maybe by the end of next week?

Commissioner Knox: Ms. Donovan, your letter illuminated some difficult issues in this. The timing, something of this magnitude, the day before a hearing is just not fair. We want to do a good job of this and we don't want to penalize people for bringing their views to us late, but it does make informed analysis very difficult.

Ms. Donovan: I understand and I am sorry to bring it up so late. I hadn't focused on it, nor had the staff with the abstract question of a recall coming up and the way the statute is written. Although, they, quite honestly, came up with Prop. 73 and Prop. 208. Looks like we won't escape them again.

Chairman Randolph: I don't think it was that the staff didn't think of them, they just probably didn't think that level of detail was necessary for the reg. But if the regulated community feels like it is necessary to make some decisions on those specific issues, then that is what we should do.

Commissioner Downey: That is what I am hearing, and we owe it to the regulated community.

Chairman Randolph: Does somebody want to make a motion on the regulation?

Commissioner Karlan: One thing. On page 3 of the draft in the Comment section, this is a minor thing, but it might be easier on line 13 to have a period after the word "Act." Take out "including the following" and have that as a sentence, because I had to read it three or four times before I figured out what you were getting at here, here is the list of reports that each side has to do. So, if you could just put a period after "Act" by chapters four and five of the Act … period. And then have capital letters for "Target Officers," "Committees Primarily Formed, " . . ..

Ms. Wagner: The only thing, this isn't an exclusive list. This is helping them. I could say these reports include . . ..

Commissioner Karlan: That's fine.

Chairman Randolph: So it would say, "These reports include the following …."

Commissioner Karlan: Yes.

Chairman Randolph: Okay. Is there a motion?

Commissioner Knox: So moved with that amendment.

Commissioner Downey: Second.

Chairman Randolph: Sandy?

Commissioner Karlan: Aye.

Commissioner Downey: Aye.

Commissioner Knox: Aye.

Chairman Randolph: Yes.

Items #13, #14, and #15.

Chairman Randolph: Commissioner Downey, did you just want to ask some questions or did you want the staff …?

Commissioner Downey: It is probably the way to …. I speak to generally, why I did this to us. These three items of SEIs, and we have the Dale Cumpston case, the Coby King and the Martha Uribes case. Let's see what my concerns were. In the first one, we had a SEI that was four months late, came on the heels of three requests by the local assistant registrar and two calls from Enforcement and the fine went to the high end because of compelling factors that I was unsure about. Let me continue onto the next one before we respond to that one. Then we got into Coby King, who was a member of the California Counsel on Criminal Justice and he was four and one half months late or so. And he did

an odd thing, he faxed in his SEI after hearing direct request that that was not the way to do. An original needed to be filed and he didn't get around to filing the original for another eleven months. And then the staff report says, "he immediately filed the original SEI" and so a low-end fine would be appropriate. And then finally, we get to Martha Uribes who looked like a pretty sophisticated SEI filer to me from the positions she'd held and was moving to, and she received five contacts regarding the late filings of two SEIs, a leaving office and an assuming office SEI, and she ended up with the lowest possible fine, $200 for each of the two SEIs. It just seemed to me in reading these three together that there might be some inconsistencies in deciding whether we were on the high end or low end, and I am curious what factors were really going through Enforcement's mind in determining these recommended fines.

Jeff Sly, Commission counsel for the Enforcement Division: Essentially, all three of these cases in one way or another started out in the Expedited Procedures Program. Certain factors that were evident in each of those cases for one reason or another essentially took the Dale Cumpston case out, and Martha Uribes. Essentially, Dale Cumpston's case would have typically fallen right into the Expedited Procedures Program except for the fact that when it came time to actually negotiate and settle the case, he elected not to do that until after he was served with an accusation. At that point in time, he came to the table and wanted to settle the case.

Commissioner Downey: I am sensing the policy here is, if you want to opt out of our Expedited Procedures, he pays you money and takes his chances and we're likely to go to the high end if we are going to settle this. Is that the gist of what is going on?

Mr. Sly: Essentially, I think the Expedited Procedures Program is based upon: 1) Promptly filing the statement after you have been contacted by the Enforcement Division, and 2) an early resolution of the case. In Dale Cumpston's matter, the case was not resolved early on, and, in fact, required serving an accusation before he came to the table and wanted to settle the case.

Commissioner Downey: So the key thing was actually having to serve the accusation. I mean, he did file within thirty days of contact, which is typically how we expedite things on the low end, but . . ..

Mr. Sly: Correct.

Commissioner Downey: He made us go through some hoops, and . . . okay.

Mr. Sly: Essentially, the thought behind that settlement was the fact that we need to encourage people to settle these cases early on and if waiting until the eve of potentially either a default or setting this matter for a hearing, people then get to come to the table and get the same end result, it would not encourage anyone to come to the table early on and settle the case. So we thought it was appropriate that the fine be substantially higher in that circumstance.

Commissioner Downey: Point taken. How about Coby King? What's this "immediate filing" when he did it eleven months afterward?

Mr. Sly: Essentially, Coby King's case was kind of an interesting deal. Once he was contacted by the Enforcement Division, he did essentially produce a statement. He faxed it to this agency and he indicated that he thought he mailed it, but he couldn't prove that he had actually done that. He subsequently produced the original statement after I had served him with a PC report, which is typically how I handle these cases. I just serve them and talk to them after that.

Commissioner Downey: Why wasn't this expedited?

Mr. Sly: Actually, it was, it was handled under the Expedited Procedures Program. This is essentially in the expedited procedures program, we concluded this case was resolved after an attorney, myself, had injected action into this case. In those situations, the fine increases from the two to three hundred dollars to the four to six hundred dollar range. The fact that he had actually produced a statement, even though it wasn't an original statement, came into our …. It was a factor we considered with regard to going at the low end of that scale.

Commissioner Downey: So it was a mitigating factor?

Mr. Sly: He had actually disclosed, he had actually filed a statement; it just wasn't technically an original signature statement. We still had the faxed copy.

Commissioner Downey: Okay and now about Ms. Uribes here? She's been around for awhile and knows about filing SEIs, gets five contacts regarding the leaving office and assuming office and really gets a low fine. What is that about?

Mr. Sly: Essentially, in Ms. Uribes's case, other than the fact that there were two statements involved, she probably would have been handled in the Expedited Procedures Program. In her particular circumstance, being a legislative staffer, it is common practice that they leave one position and turnaround and take another position, and as long as that transaction occurs within 30 days, they don't have two filing requirements. In this particular circumstance, five months had lapsed and so she actually incurred a separate filing obligation. Given that circumstance, we thought it was appropriate to go ahead and handle it at the low end of the Expedited Procedures Program because other than that distinction, this case would have been handled under the Expedited Procedures Program anyway.

Commissioner Downey: Our office did contact her five times, but it wasn't always ….

Mr. Sly: It wasn't in relation to any one of those statements. It had to do with both the leaving office for the first position and the subsequent assuming office for the second position.

Commissioner Downey: Okay.

Chairman Randolph: And that case did not involve an attorney contact, is that right?
Mr. Sly: Correct.

Chairman Randolph: Yes, that was just the SEI Coordinator contact. Okay. Are you prepared to move those items?

Commissioner Downey: Yes. Move adoption of the staff recommendations or stipulations.

Commissioner Karlan: Second.

Commissioner Karlan: Aye.

Commissioner Downey: Aye.

Commissioner Knox: Aye.

Chairman Randolph: Aye.

Item #17.

Chairman Randolph: Moving onto Item 17. The proposal to analyze proposals to move Government Code section 1090 into the Political Reform Act.

John Wallace, Legal Division: I am here to present Agenda Item 17. The item concerns the proposal from the regulated community to investigate merging other conflict-of-interest laws that currently exist outside the Political Reform Act into the framework of the Political Reform Act. As the memorandum discusses in some detail, there are a variety of other conflict-of-interest laws not currently in the Act, such as Government Code 1090, conflict-of-interest provisions in the Contracts Code and the doctrine of incompatible offices. Many of these laws have existed well before the adoption of the Act in 1974 by the voters. For example, some of the earliest cases dealing with now what is Government Code section 1090 predate the Act by almost 70 years. Now, the primary difference between these other laws and the Political Reform Act is that in adopting the Act, the voters also created this Commission and agency and as a result, there was a mechanism to implement and clarify the statutes by regulation. There was a mechanism to provide advice on compliance with the provisions of the Act and also a mechanism to provide immunity in appropriate cases. For the most part, for these other statutes, the only available resource was the Attorney General's office and while they were very knowledgeable and helpful in the area, they were not authorized to provide immunity to requestors, so it was generally considered informal advice. The other noteworthy point of the distinction between the statutes not in the Act is the severity of the consequences.

The memo goes on to talk about Government Code section 1090 at length and as the memo notes, a series of statutes provides for felony penalties and also requires disgorgement of any kind of gain you receive as a result of an illegal contract. In the *Thompson v. Call* case, it not only resulted in an official losing profit from selling property to the municipality, but he also lost the property as well. So the consequences are very severe. The interested persons contacted us because they thought that having these other laws in the Act would allow greater comfort for public officials in being able to get advice and having regulatory interpretations. What we are asking for today is simply authorization to perform a study as to whether such a merger of these different laws is feasible and whether such a merger can be accomplished without doing damage to any existing bodies of law.

If you look at the first attachment in the memo, we have a tentative work plan. What we would like to do is pursue this study over the remainder of the year. Probably start off with an internal task force and then gradually move on to interested persons' meetings. And then, we would like to review this with no pre-conceived notions and at this point, we would not recommend incorporating these sections or not. And then, we would come back at the beginning of next year with a recommendation to the Commission. Because this will take some staff time and resources, we are asking for your authorization to do that. I would be glad to respond to questions. We do have some speakers here as well, I believe.

Chairman Randolph: Any questions for staff?

Commissioner Downey: No questions; I would like to hear from the speakers.

Marte Castaños, representing the California Public Employees Retirement System: We want to thank staff, the Chair and the Commission for their interest in this project. We

think the Commission has a golden opportunity to spearhead an effort to address the substantial confusion and dare I say, ignorance regarding Gov. Code section 1090, and its effects on the regulated community, public officials and the decisions they are making, and I would urge you to study the issue with an open mind. I appreciate your interest in the issue. Thanks.

Michael Martello: I am the city attorney of Mountain View and the chair of the League of Cities FPPC Committee. I can't really add anything to the staff report, but I would note that other than for the pesky issues of funding and workload, this integration and this study is probably a natural. It would be a great service to the regulated community, and I think the chief thing that the FPPC will bring to it if you play some role with 1090, is the awareness of it. It is a very critical law. A lot of times under the Political Reform Act, we are dealing with possibilities of conflict. With 1090, we are dealing with interesting contracts and it is very significant. And what I find, because of my profile in our legal community among city attorneys, is when I get a call for a gut check on the Political Reform Act, I say, "well, what about 1090" and it is just that lack of awareness that I think the Commission could bring to it. So, we would look forward to participating and helping staff formulate this and we would go forward as well, knowing that until we solve what could be potential workload and funding issues, as we scope the project, it may not go anywhere. But this is a very important first step.

Chairman Randolph: Thank you. Any comments?
Commissioner Downey: My comment would be to go with the staff recommendation. I mean the McPherson Committee, Mr. Martello, CalPERS, I guess we aren't getting any opposition to this from the Attorney General's office. It looks like a clear green light and makes good common sense at this stage. Very nicely written memo, by the way.

Commissioner Karlan: I thought it was really interesting too. I just want to ask one question: I couldn't tell whether there were three things or two things that you were kind of hoping to accomplish. One advantage of merging the two is then you have a regulatory body that can do regulations as well as the statute itself. A second one is the possibility for advice letters that create insulation from later disciplinary proceedings. I wasn't sure whether there was a third one, which is to make sure that the substance of the two provisions melds completely or whether that wasn't something you were worried about. I just couldn't tell.

Mr. Wallace: You know, it is an issue that I think was addressed the first time, in 1985 when this came up. We're sort of at a position where we are trying to be real open about any type of an approach. We've heard opinion that maybe the statute should be moved in unchanged simply because there is fear that it could actually diminish the effectiveness of 1090, so at this point it is not clear whether we would necessarily try to meld them as much as, or recommend melding them. We may come back with that recommendation next year though.

Ben Davidian (Bell, McAndrews, Hiltachkt & Davidian): I was the author of a substantial portion of the McPherson Commission report on Enforcement, including the

section that was involved there. One thing that I did want to stress, is that while I encouraged this move, because we felt at the McPherson Commission that it was a good idea to get all of these things under one roof, we did not discuss any suggestion to move criminal enforcement authority to the FPPC. So I just want to … as long as everyone understands that that was certainly not the thrust of the McPherson Commission nor would I encourage you all to do that. It is not something I think the FPPC would want to become involved with, but with that single exception, then I think it is a very good idea to move all these things under one roof, so people can understand. You are exactly right, I mean whenever anyone asks me about a conflict, I say, "Well, then we have this little 1090 situation," and they go, "what the heck is 1090?" And I say it is nothing in particular, other than what I lovingly refer to as the "death penalty of conflict-of-interest laws." So, it would be a good idea.

Chairman Randolph: I think there are a lot of issues that would have to be addressed as part of the whole study process, interested persons' meetings and getting input from a lot of different people about whether they would come in completely, whether they would be changed, how the enforcement would work, and all that. So I think it is well worth spending time on. Any other comments or shall we entertain a motion?

Commissioner Knox: Move to approve.

Commissioner Karlan: Second.
Commissioner Karlan: Aye.

Commissioner Downey: Aye.

Commissioner Knox: Aye.

Chairman Randolph: Aye.

Items #18, 19 and 20.

Chairman Randolph: The next item is Item 18, the Legislative Report. There are two bills on which you wanted us to take action. The rest of it was informational.

Mr. Krausse: Correct. The first item is simply a revisitation downward of our estimate of costs on the bill that would expand one of the revolving door prohibitions, AB 1678. And I think this is a little more accurate estimate, so I would request your authority to reduce that.

Chairman Randolph: And then the second one is?

Mark Krausse: The second one is a bill the Commission is sponsoring; it had to do primarily … the big item in it was the definition of "cumulative contributions" which we sponsored last year. That bill failed, not because of the content, just be ….

Commissioner Downey: This is Perata's bill?

Mr. Krausse: This is Perata's bill. Correct. So this was our omnibus bill, so to speak. This contained all our little fixes and what happened was, the plaintiffs in *Levine vs. FPPC* case, the slate mail litigation, approached Senator Burton, and Burton said well, in order to try to perfect the statutes involved in that litigation once the judge had rendered his decision ... .Burton just sent him off to Perata because Perata is the chair of the Elections Committee and this was the bill that was identified. So, staff has done a review of it, they have no opposition to it. The staff recommendation is that you continue to support the legislation, but it was something that needed to come back to you.

Chairman Randolph: Does anyone have any problems or questions with the staff recommendation? Okay.

Mr. Krausse: The only other update item is SB 641 the Brulte bill. You will recall on telephone disclosure. The Commission had taken a "support if amended" position on it. The author has taken the amendment to the extent that we were asking for retention of the recording and the text of the phone call. So he accepted that amendment. He didn't want to move the disclosure to the beginning of the phone call. Since it is not agendized, I can't ask for any change of position on that or check in with you, but it was conveniently held in committee in the Assembly the other day. This is what happened to the bill last year as well. There is just opposition to the proposal, so I don't know if we will see this bill make it out, but if so, I may have to come back and ask you that question.

Chairman Randolph: Okay. Don't go anywhere. The next item is the Executive Director's report. Do you have anything to add or do any of the Commissioners have any questions about it?

Mark Krausse: Nothing to add.

Chairman Randolph: Okay. Submitted.

Mr. Krausse: I don't put updates on the state budget because you usually read a more timely version in the newspaper. Thanks.

Chairman Randolph: Okay. And the Litigation Report? Ms. Menchaca, is there anything to add?

Ms. Menchaca: No.

Chairman Randolph: Okay. Accepted. And that is it for our open session agenda. So we will be adjourning into closed session. Thank you all for coming. Have a good day. (Adjourned at 11:24 a.m.)

CLOSED SESSION

OPEN SESSION RECONVENED AT 1:27

Chairman Randolph: Okay. It is 1:30 p.m. We have emerged from closed session. We have no reportable action taken, so the meeting of July 10th is now adjourned.

Dated: August 11, 2003.

Respectfully submitted,

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Joan Giannetta
Legal Secretary

Approved by:

_____
Chairman Randolph